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RELIGIOUS LIBERTY AND THE QUINCENTENARY: OLD WORLD INTOLERANCE, NEW WORLD REALITIES, AND MODERN IMPLICATIONS

PAUL FINKELMAN*

Three major events occurred in Spain in 1492. Today we remember them in reverse order of their importance for fifteenth century Spaniards. Ironically, all three events bear on what was one of the most significant legal developments of the European settlement of the Americas—the emergence of religious toleration and eventually religious freedom in much of what was once called the New World. Spain's intolerance helped create conditions that led to tolerance in the Western Hemisphere.

The victory at Granada in January 1492 marked the end of a ten-year campaign to eliminate the final Moorish foothold in Spain.¹ The *Reconquista* was now complete. This was clearly the most important event of 1492 for Spaniards. Spain was now a unified nation under the Catholic monarchy of Fernando and Isabel. After 741 years, the "infidels" were no longer a political force in Spain.²

The victory over the Moors was a prelude to ridding Spain of the other group of non-Catholics, the Jews. On March 31, 1492, King Fernando and Queen Isabel ordered the expulsion of all

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¹ See MAURICE ROWDON, *THE SPANISH TERROR: SPANISH IMPERIALISM IN THE SIXTEENTH CENTURY* 47 (1974). The Catholic reconquest of Spain began at least as early as 1085 with the capture of Toledo. *Id.* In 1212, the Christians won a major battle at Las Navas de Tolosa; in 1236, "the Castilians took Cordoba," and "in 1248 they took Seville." *Id.* at 36. At this point the reconquest ended and was not resumed until the late fifteenth century. *Id.*

² See Marilyn Robinson Waldman, *Muslims in Spain*, in 2 *THE CHRISTOPHER COLUMBUS ENCYCLOPEDIA* 491, 492 (Silvio A. Bedini ed., 1992) [hereinafter *COLUMBUS ENCYCLOPEDIA*]. In 1502, Moslems in Spain were given the choice of conversion or expulsion. *Id.* Many accepted conversion, but they were never integrated into Spanish-Catholic society. *Id.* Finally, in 1609, King Philip III ordered the expulsion of the 300,000 to 500,000 *Moriscos*, as the converted Moslems of Spain were called. *Id.*

Jews from their domains. They gave the Jews of Castile and Aragon until July 31 to accept baptism or leave. This mandate was the culmination of local expulsions, which had been going on for more than a decade. By the end of the summer the great Jewish culture of Spain was no more.³ Between 1478 and 1492 the clerical and civil authorities of the Inquisition⁴ had forced Spain's Jews to either leave or convert.⁵ After the victory over the Moors, this was surely the second great event of the year for Spain. In less than a year the new rulers of Spain destroyed the last vestiges of some 500 years of religious diversity and tolerance.

In the first few days of August 1492, huge groups of Spanish Jews sailed for Moorish North Africa and Italy. On August 3, while the Jews of Spain sailed south and east across the Mediterranean, Christopher Columbus sailed three ships west across the Atlantic. The European expansion into the New World thus coincided with the end of religious toleration in Spain.

Columbus primarily sought new trade routes to Asia. He also wanted to bring Catholicism to new peoples. He would accomplish the latter, while failing in the former. "The important role of missionary activity to Columbus himself is evidenced by the signature he routinely used after the [first] voyage, *Xpo Ferens*, 'He who carries Christ.'"⁶ On his second voyage, Columbus took friars "to Christianize the Indians."⁷ Priests subsequently accompanied the conquistadors throughout New Spain.

Spain brought both its religious fervor and its religious intolerance to the New World. Jews and recent converts to Christianity were prohibited from settling in New World colonies. Eventually

³ STEPHEN HALICZER, *INQUISITION AND SOCIETY IN THE KINGDOM OF VALENCIA, 1478-1834*, at 83-86 (1990); HENRY KAMEN, *INQUISITION AND SOCIETY IN SPAIN IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* 4-18 (1985).

⁴ See Angel Alcalá, *Inquisition*, in 1 COLUMBUS ENCYCLOPEDIA, *supra* note 2, at 375, 375. "The Spanish Inquisition was an ecclesiastical tribunal established in 1478 by Isabel and Fernando to determine whether the conversos [Jewish converts to Catholicism] were practicing Christianity and not their former Jewish rites." *Id.* Unlike previous inquisitions "the Spanish Inquisition was a department of government." *Id.*

⁵ See KAMEN, *supra* note 3, at 4-18. In 1497, the remaining Jews of Portugal would also be expelled and in 1498 the Jews of Navarre, the last Jews on the Iberian Peninsula, were forced to leave. *Id.*

⁶ John F. Schwaller, *Missionary Movement*, in 2 COLUMBUS ENCYCLOPEDIA, *supra* note 2, at 471, 471.

⁷ *Id.*

Spain expanded this policy to bar children and even grandchildren of converts from emigrating to the colonies. Spanish authorities burned at the stake some Jews who did come to New Spain.⁸ In the sixteenth and seventeenth centuries, Spain created Inquisitorial tribunals in Mexico, Peru, and present-day Colombia.⁹ Similarly, the Portuguese brought their Inquisition and official anti-semitism with them to the New World. The first Jewish families to come to New Amsterdam would be refugees from the Portuguese Inquisition.¹⁰

Other Europeans brought to America similar concepts of intolerance. After 1517, the Protestant Reformation changed the landscape of European religion, but did little to alter legal and theological notions of tolerance or concepts of the alliance of church and state. Some Protestant nations tolerated other "dissenting" Protestants. Practicality led some Catholic regimes to tolerate the presence of a few Protestants; similarly, some Protestant regimes did not chase out or kill all the Catholics under their control. Not all of Christian Europe was as absolutely intolerant of Jews as Spain after 1492.¹¹

Declining to kill or expel those of a different faith barely constitutes toleration. By the time of the first permanent English settlement in North America, at Jamestown in 1607, Protestant England, like Catholic Spain, generally accepted the notion that religious diversity was unsafe and should be discouraged.

I. RELIGION AND THE STATE: THE SEVENTEENTH CENTURY EXPERIENCE

Virtually all political leaders of the sixteenth and seventeenth

⁸ See Judith Larkin Elkin, *Jews in the New World*, in 1 COLUMBUS ENCYCLOPEDIA, *supra* note 2, at 392, 393 (such persecuted Jews included Louis de Carvajal the Younger and some of his family).

⁹ Alcalá, *supra* note 4, at 375.

¹⁰ HENRY L. FEINGOLD, *ZION IN AMERICA: THE JEWISH EXPERIENCE FROM COLONIAL TIMES TO THE PRESENT* 20-24 (1974); JACOB RADER MARCUS, *EARLY AMERICAN JEWRY: THE JEWS OF NEW YORK, NEW ENGLAND, AND CANADA, 1649-1794*, at 24-33 (1951). On these early Jews, see HYMAN B. GRINSTEIN, *THE RISE OF THE JEWISH COMMUNITY OF NEW YORK* 21-36 (1945); Samuel Oppenheim, *The Early History of the Jews in New York 1654-1664*, in 18 PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY 1-91 (1909).

¹¹ For example, Oliver Cromwell invited Jews to move back to England, where they had previously been prohibited from living since being expelled in July 1290.

centuries accepted the idea that religious diversity undermined the stability of any government. Most people believed that in any kingdom a ruler and his or her subjects should have the same religion. This was based on the assumption that religious differences could create conflict within the country which might lead to civil war and anarchy. This was certainly true during the brutal wars of the sixteenth century. Thus, the Peace of Augsburg in 1555 ended years of religious wars in the Holy Roman Empire by establishing throughout most of the Empire the concept of *cuius regio, eius religio* (whose the region, his the religion), which allowed local rulers to decide the religion of their subjects. In 1648, European leaders reaffirmed this principle in the Treaty of Westphalia, which ended the Thirty Years War.¹²

Although England was not a party to either treaty, the English monarchs understood and agreed with the theory behind the treaties. Indeed, this theory had a special meaning in England, where after the English Reformation the monarch was not merely the head of the nation, but also the head of the nation's official church. Thus, to reject the Church of England was in part to deny the authority of the monarch. Queen Elizabeth I declined to seek "windows into men's souls," and thus tolerated Puritans and other Protestants who wanted to further reform the Church of England; but she was less tolerant of Catholics, who, from the official English perspective, took their orders from a foreign ruler, the Pope.¹³ Nevertheless, she declined to actively persecute them.

The English Civil War led to some expansion of religious toleration in England. The Puritans, under Cromwell, invited Jews to return to the country over 350 years after they were first expelled.¹⁴ By the end of the seventeenth century, England had come to understand the value of limited toleration of religious diversity. Dissenting Protestants, including Puritans, Separatists, Quakers, Presbyterians, and Baptists were tolerated, as long as

¹² The toleration of Jews in parts of Christian Europe did not affect this general concept. Jews were usually denizens of a particular nation or principality, living there by the sufferance of the sovereign. Since they were militarily and politically powerless, their presence could not undermine the political stability of the ruler.

¹³ See LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 88-89 (1968) (describing fear of Catholics in Tudor England).

¹⁴ See *supra* note 11 (noting Cromwell's treatment of Jews).

Religious Liberty

their allegiance to the crown remained firm. Under the same conditions, England allowed Jews and Catholics to remain within the realm. Even this limited toleration at the end of the century had not existed at the beginning of the century. But, limited toleration did not mean religious freedom or equality. The Anglican Church remained established and public office remained closed to anyone who was not a member of that Church. The attempt by James II to grant some civil liberties and political rights to Catholics in 1688 precipitated the Glorious Revolution.

II. FREEDOM OF RELIGION IN THE BRITISH AND DUTCH NORTH AMERICAN MAINLAND COLONIES

Some of the earliest English settlers came to the New World in search of religious liberty. However, few colonists had the same notions of religious liberty that most Americans accept today. The seventeenth century Separatists and Puritans who left England were partially or primarily motivated by a desire to be left alone to practice their religion. The Massachusetts Puritans sought religious liberty *for themselves*, but had little patience for those who did not agree with their theology. Most Americans know that nineteen convicted witches were hanged in Salem in 1692; few learn about the hanging of four Quakers in Boston between 1659 and 1661.¹⁵ Statutes in Connecticut allowed similar punishments, but that colony limited its persecution of religious minorities to jail, fines, expulsion, or banishment. Virginia began with the Anglican Church as the official church in the colony. Even Maryland, noted as a haven for Roman Catholics, began with the Anglican Church as the established religion.¹⁶ Non-English settlements were no different. In the French colonies Catholicism was not only established, but, after King Louis XIV revoked the Edict of Nantes in October 1685, Protestants were barred from Old and New France alike. New Netherlands established the Dutch

¹⁵ See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 178-79* (1972) (noting that repressive Puritan measures led to hangings of four Quakers).

¹⁶ See The Charter of Maryland § IV (1632), in 3 *THE FEDERAL AND STATE CONSTITUTIONS 1677, 1678-79* (Francis N. Thorpe ed., 1909) [hereinafter *CONSTITUTIONS*]. The Maryland Charter required that all churches in the colony "be dedicated and consecrated according to the Ecclesiastical Laws of our Kingdom of England." *Id.*

Reformed Church.

The failure to extend religious toleration to nonestablished faiths in the colonies during the first half of the seventeenth century was both religiously and politically motivated. The Puritans sought to create a godly community—a “City on the Hill”—and thus wanted no dissenters nor nonbelievers among them. The Puritans believed that they were paving the way for the second coming of Christ and naturally enough did not want to jeopardize that great event by allowing other Protestant denominations or Catholics within their domain. Furthermore, the Puritans believed that the presence of non-Puritans would undermine the social and political stability of the colony.

The Puritans could not entirely create the society that they wished. As an English colony, Massachusetts Bay could not prohibit Anglican settlers. But, by and large, the seventeenth century New England colonies (with the exception of Rhode Island) were monolithic Puritan havens.

The English colonial settlements, Puritan or Anglican, were precarious. The settlers believed they could not afford to allow religious disputes to distract the colonists. In this sense, at least in the beginning, the colonies mirrored Europe.

III. ROGER WILLIAMS AND THE ORIGIN OF TOLERATION IN AMERICA

In the 1630s, one man in America—Roger Williams—developed an alternative view of the relationship between religion and government. Religious freedom in America began in Rhode Island, as a result of the brilliant ideas and peculiar circumstances of the colony's founder, Roger Williams.

In the early 1630s, Williams reached the conclusion that separation of church and state was the only means of preventing the state from corrupting the church. For example, Williams objected to the state's forcing people to attend church, but not because he thought church attendance was a bad idea. On the contrary, he favored it for all people, but he opposed mandatory church attendance because he did not want to pray with sinners and unbelievers. As long as the state fined those who did not attend church, Williams knew that sinners and unbelievers would be praying with him. Similarly, Williams objected to the common

book of prayer, required in England, because he believed religion could be corrupted if government regulated it. Once the government began writing prayers, then prayer would cease to be a religious act. One need only read the New York State Regents Prayer, struck down in *Engel v. Vitale*,¹⁷ to understand the fear Williams had that state-sponsored prayer or religious service would corrupt religion.

Williams came to understand that religious toleration would work if all people accepted three principles: 1) that everyone in the community must obey the civil authorities; 2) that the state should not tell anyone how to worship or in any other way support one church over another; and 3) that no individual or government official should interfere with the private worship of another. Williams was only beginning to explore these ideas when he was expelled from Massachusetts in 1635. His expulsion was fortuitous in that he became free to implement his radical notions of toleration. Rhode Island became a safe haven for religious dissenters through a happy combination of philosophy and necessity.

When the Rhode Island settlers formed their own government in 1640, they eagerly agreed to what already existed: religious toleration. The Plantation Agreement at Providence declared that "Wee agree, as formerly hath bin the liberties of the town, so still, to hold forth liberty of Conscience."¹⁸ This principle was maintained under the Patent for Providence Plantation, granted in 1643, and strongly reaffirmed in their charter, granted by King Charles II in 1663. After independence Rhode Island did not write a constitution, but simply removed all references to the monarchy from this charter. Thus, at the time of the Constitutional Convention the "rights" of Rhode Islanders included the pronouncement that:

¹⁷ 370 U.S. 421 (1962). Each morning New York school children recited the prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. It is hard to imagine a prayer that would be less religiously significant. The text lacks any of the significant aspects of prayer used by religious Christians, Moslems, or Jews. It was recited while standing, contrary to the practices of many Christians (who kneel) and Moslems (who kneel and then prostrate themselves). Orthodox and Conservative Jews, who cover their heads to pray, did not do so when reciting this prayer.

¹⁸ Plantation Agreement at Providence—Aug. 27-Sept. 6, 1640, in 6 CONSTITUTIONS, *supra* note 16, at 3205, 3206.

noe person . . . at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion . . . but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and their owne judgments and consciences, in matters of religious concernments.¹⁹

Nearly a century and a half before the American Revolution, Roger Williams created a society which was able to separate church and state to the mutual benefit of both. Equally important, Williams developed a creative and persuasive defense of his position. In *The Bloody Tenet, of Persecution For Cause of Conscience* (1644) and *The Bloody Tenet Yet More Bloody* (1652) Williams out-thought and out-argued the great Puritan minister John Cotton on the issue of toleration.

His concept of politics and religion was relatively simple and was set out most clearly in a famous letter to the Town of Providence in 1655. Williams postulated that a ship at sea contains "both papists and protestants, Jews and Turks." He argued that on this ship—which is, of course, an analogy for any society:

[T]he liberty of conscience . . . turns upon these two hinges — that none of the papists, protestants, Jews or Turks, be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any . . . [But] notwithstanding this liberty, the commander of the ship ought to command the ship's course, yea, and also command that justice, peace and sobriety, be kept and practiced, both among the seamen and all the passengers. If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or in purse, towards the common charge or defence; if any refuse to obey the common laws and orders of the ship . . . if any shall mutiny . . . if any should preach or write that there ought to be no commanders or officers, because all are equal in Christ . . . in such cases . . . the commander or commanders may judge, resist, compel and punish such transgres-

¹⁹ Charter of 1663, in 6 CONSTITUTIONS, *supra* note 16, at 3211, 3213.

sors, according to their deserts and merits.²⁰

In essence, Williams concluded that in any state all people were bound to respect and obey civil authorities when carrying out their civil duties, civil authorities were bound to allow peaceable religious practice of all people, and no individuals could disturb the religious practices of others. If these three concepts were implemented, then toleration and a peaceful society would be achieved.

Williams wanted to create a religiously Protestant, but non-denominational, society. But he did not think this could be done through coercion. He allowed Jews into his colony without a second thought. He acknowledged that some non-Protestants might disrupt or threaten a society. For example, he recognized Catholics as one such group because "their allegiance to a foreign potentate might pose a danger to public safety."²¹ However, Williams would not prohibit their worship, but did think it might be proper to disarm them and make them wear distinctive clothing.²² Similarly, because the Quakers' "contempt for authority threatened the state," Williams "called for suppression only of their 'incivilities,' not of their worship."²³ Williams did not create a state with full religious toleration. That was probably impossible in the first half of the seventeenth century. But Williams did lay out a theory of religious toleration that could work, even in a seventeenth century society.

IV. "HUDDLED MASSES YEARNING TO BREATHE FREE": RELIGIOUS REFUGES OF THE SEVENTEENTH CENTURY

Roger Williams developed a concept of religious toleration from his understanding of God and through the power of his own ideas. Few governments, at any time, are blessed with the leadership of such a man.

Two colonies, Maryland and Pennsylvania, began with quite dif-

²⁰ Letter from Roger Williams to the Town of Providence (Jan. 1655), in *PURITAN POLITICAL IDEAS* 222-23 (Edmund Morgan ed., 1965).

²¹ EDMUND MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* 137 (1967).

²² *Id.*

²³ *Id.*

ferent notions of religious toleration, although both started as safe havens for oppressed religious minorities in England.

A. Maryland: Catholicism Without An Inquisition

Maryland began as a safe haven for English Catholics. The founder of the colony, George Calvert, was educated at Oxford, knighted in 1617, and became Secretary of State and a member of the King's Privy Council in 1619. In 1624, he converted to Catholicism, knowing this would end his public career. He remained in the Privy Council until 1625. In that year he was also made the Baron of Baltimore.²⁴ His loyal service to the King overcame hostility to his new religious beliefs. In 1632, King Charles I granted Lord Baltimore lands in Virginia, but opposition to him there, because of his religion, forced a change northward. By the time King Charles I actually issued the patent for Maryland, the first Lord Baltimore had died, and his son, Cecilius, received the patent. The charter required the colony to foster "God's holy and true Christian religion," but did not specify any particular denomination.²⁵ This was designed to allow the Roman Catholic Calverts to give religious freedom to their co-religionists, while at the same time avoiding any overt conflict with the Church of England.

In 1633, Cecilius Calvert, the Second Lord Baltimore, instructed his brother, Leonard Calvert, the colony's Deputy Governor, to allow Roman Catholics to practice their faith in private, but to "be silent vpon all occasions of discourse concerning the matters of Religion."²⁶ From 1634 until 1649, the colony maintained de facto religious toleration for Catholics and Anglicans alike. After 1636, Calvert's officials took an oath not to "trouble, molest or discountenance any person professing to believe in Jesus Christ, for or in respect to religion" and, at the same time, to suppress any who would oppose Christianity.²⁷

²⁴ See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 131 (1983). The word Baron is used to describe a "lord of the realm." *Id.*; see also DICTIONARY OF AMERICAN BIOGRAPHY 428-29 (Allen Johnson, ed. 1929). The Baron of Baltimore was commonly referred to as Lord Baltimore. *Id.*

²⁵ The Charter of Maryland § VII (1632), in 3 CONSTITUTIONS, *supra* note 16, at 1680.

²⁶ ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 189 (1950).

²⁷ *Id.* at 190.

Religious Liberty

In 1649, the Maryland Act of Toleration provided religious toleration for all Trinitarian Christians and, at the same time, provided a death sentence for anyone who would deny the divinity of Christ, the Trinity, the "Vnity [sic] of the Godhead, or shall utter any reproachfull Speeches, words or language concerning the Holy Trinity, or any of the said three persons thereof"²⁸ The statute provided fines for anyone who:

uppon any occasion of Offence or otherwise in a reproachfull manner or Way declare call or denominate any pson or psons whatsoever inhabiting residing traffiqueing trading or comerceing within this Province . . . an heritick, Scismatick, Idolator, puritan, Independant, Prespiterian[,] popish prest, Jesuite, Jesuited papist, Lutheran, Calvenist, Anapabtist, Brownist, Antinomian, Barrowist, Roundhead, Sepatists, or any other name or terme in a repraochfull manner relative to matter of Religion. . . .²⁹

Seventeenth century Maryland was not as religiously open as Rhode Island or Pennsylvania. Unitarians, Quakers, and some other Christians were unwelcome in the colony. Jews faced persecution and discrimination throughout that period, and would not have full civil and political rights until 1828.³⁰ Nevertheless, the Maryland colony provided more religious freedom for Christians than almost any country in Europe at that time.

The very circumstances of the Maryland colony illustrate how much had changed in the century and a half since Columbus had first arrived in the New World. In 1492, Catholicism had been synonymous with the worst sort of religious persecution and intolerance. But, filtered through the politics of Anglican England, the Catholicism of the Calverts led them to provide the conditions for an important, though incomplete, step towards religious freedom.

B. Pennsylvania: The Gentle Way of Toleration

Like the Calverts, William Penn was politically well connected,

²⁸ Maryland Act Concerning Religion (1649), *reprinted in* 5 THE FOUNDERS CONSTITUTION 49 (Philip B. Kurland & Ralph Lerner eds., 1987).

²⁹ *Id.*

³⁰ MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* 36-42 (1984).

Oxford educated, and wealthy. Penn was a bundle of contradictions. His father, Admiral Sir William Penn, was a naval hero who had conquered Jamaica under Cromwell. The younger William became a Quaker pacifist. Young William was a lifelong idealist, a devout Quaker, a sincere humanitarian, something of a mystic, and "the author of a minor devotional classic, *No Cross, No Crown*."³¹ But, Penn was also "eminently a man of the world: sometime student at Christ Church (Oxford), Saumur, and Lincoln's Inn, . . . manager of his father's Irish estate, widely traveled and deeply involved in the affairs of his time."³² Among his friends were John Locke, Algernon Sidney, but also King Charles II and James, Duke of York. In 1666, Penn began attending meetings of the Society of Friends. By 1670, he was an active Quaker and had been twice arrested for his preaching. In that same year, his acquittal for public preaching³³ led to *Bushell's Case*,³⁴ which helped establish the concept of an independent jury. Also in that year, Penn's father, Admiral Sir William Penn died, leaving young William with a large estate and, more importantly, a huge claim against King Charles II, who had borrowed money from his father. In 1681, Charles settled this claim by giving Penn title to a large tract of land which today is the state of Pennsylvania. Named for his father, Admiral Penn, at the insistence of King Charles II, Pennsylvania was William Penn's "Holy Experiment," the "most exciting adventure in the settlement of the Middle Colonies."³⁵

Although his charter from the King required obedience to England, and some pro forma establishment of the Anglican Church, Penn created a colony of true religious toleration with the adoption in 1682 of his Pennsylvania Charter of Liberty, Laws Agreed Upon in England, Etc.³⁶ He advertised throughout Northern Europe and Great Britain for settlers. The colony soon became a haven for religious dissenters, especially Quakers, Mennonites, and

³¹ AHLSTROM, *supra* note 15, at 208.

³² *Id.* at 111.

³³ *Rex v. Penn*, 6 Howell St. Trials 951 (1670).

³⁴ 124 Eng. Rep. 1006 (1670).

³⁵ AHLSTROM, *supra* note 15, at 207.

³⁶ 5 CONSTITUTIONS, *supra* note 16, at 3062.

Religious Liberty

Amish. But other Protestants—Baptists, Lutherans, and Presbyterians—flourished there as well.

Penn's Body of Laws, adopted in 1682, went further than Maryland's in providing for toleration. The franchise was granted to "such as possess faith in Jesus Christ, and that are not convicted of ill fame, or unsober and dishonest conversation."³⁷ The same regulation also created a Sunday closing law,³⁸ which was used against Jews and Sabbatarians in the eighteenth and nineteenth centuries,³⁹ and in its modern incarnation was upheld by the United States Supreme Court in *Braunfeld v. Brown*⁴⁰ in 1961.⁴¹ The Body of Laws gave virtually complete religious freedom and political equality to all Christians, except those few who were Sabbatarians.

However, unlike Maryland law, Pennsylvania law offered toleration to all, allowing anyone to settle in the colony and worship freely who "confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world."⁴² Eventually, Pennsylvania became home to the country's first organized Presbytery, a center for Baptists and Lutherans, and an early haven to both Jews and Catholics. Consistent with this heritage, in 1816 the Reverend Richard Allen founded the African Methodist Episcopal Church in Philadelphia and became Bishop

³⁷ *Id.* § XXXIV.

³⁸ *Id.* "That according to the good example of the primitive Christians, and the ease of the creation, every first day of the week, called the Lord's day, people shall abstain from their common daily labour, that they may the better dispose themselves to worship God according to their understandings." *Id.*

³⁹ See, e.g., *Specht v. Commonwealth*, 8 Pa. 312, 326 (Pa. 1848) (Seventh Day Baptist Congregation challenge to Sunday closing law rejected); *Phillips et al. v. Gratz*, 2 Pen. & W. 412, 417 (Pa. 1831) (Jewish litigant in contract action denied trial continuance for action scheduled on Saturday); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 50 (Pa. 1817) (rejecting challenge by Jewish merchant to Sunday closings as conflicting with constitutional right of conscience); *Stansbury v. Marks*, 2 Dall. 213, 213 (Pa. 1793) (Jewish witness refusing to be sworn on Saturday assessed fine for refusing to testify). See generally Michael W. McConnell, *The Origins and Historical Understanding of Religion*, 103 HARV. L. REV. 1410, 1506-10 (1990) (discussing line of cases, from 1817 to 1848, challenging Pennsylvania Sunday closing laws).

⁴⁰ 366 U.S. 599 (1961).

⁴¹ *Id.* at 609. Pennsylvania's Sunday closing law was challenged by Orthodox Jews and found constitutionally valid facially and as applied. *Id.*; see *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 598 (1961) (rejecting challenge by Jewish merchant to Sunday closing law).

⁴² Pennsylvania Charter of Liberty, Laws Agreed Upon in England, Etc. § XXXV, in 5 CONSTITUTIONS, *supra* note 16, at 3062.

of the Church that same year.⁴³

V. IN DIVERSITY THERE IS LIBERTY⁴⁴

Religious freedom came to the New Netherlands and New York in ways quite different from Rhode Island, Maryland, or Pennsylvania. Throughout most of its pre-Revolutionary history, New York had an established church—the Dutch Reformed Church until 1664 and the Anglican Church after 1693.⁴⁵ Nevertheless, during the Revolution, New York moved closer to complete separation of church and state and absolute free exercise of religion than any other new state. The roots of New York's remarkable stand on religious freedom are found in the state's colonial history.

In New York, religious toleration did not develop because of the genius or determination of a single individual, such as Roger Williams, Lord Baltimore, or William Penn. Indeed, it did not even grow out of a philosophy of religious liberty. Rather, religious toleration grew out of what Oliver Wendell Holmes, Jr. described as the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men"⁴⁶

A. *Religious Diversity and Tolerance in New Netherland*

In the early part of the seventeenth century, the Netherlands

⁴³ CAROL GEORGE, SEGREGATED SABBATHS 89-92 (1973).

⁴⁴ An earlier version of portions of this section appeared in Paul Finkelman, *The Soul and the State: Religious Freedom in New York and the Origin of the First Amendment*, in *NEW YORK AND THE UNION* 78-105 (Stephen L. Schechter & Richard B. Bernstein eds., 1990).

⁴⁵ See JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK STATE HISTORY 40-41 (1967). The establishment of the Church of England was, in one expert's words "a strange piece of legislation." *Id.* at 61-62. The law did not use the term "Church of England," but instead called for public support for "good sufficient Protestant" ministers. *Id.* Under English law at the time, however, this could only have meant the support of ministers of the Church of England. *Id.* The law also only applied to the counties of New York, Richmond, Queens, and Westchester. *Id.* Despite the circumlocution of the statute, courts in the eighteenth century held that the Anglican church was indeed the established church in these counties, and dissenters were forced to pay the salaries of Anglican ministers. *Id.*

⁴⁶ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

Religious Liberty

became the most tolerant nation in Europe.⁴⁷ By the 1620s, Amsterdam's Jews, while officially second-class citizens, "enjoyed virtual freedom of religion in all essential respects."⁴⁸ Despite the best efforts of the Dutch Reformed Church, "Roman Catholicism flourished in Amsterdam."⁴⁹ By the 1630s, "in practice the Roman Catholics had total religious freedom in Amsterdam"⁵⁰ although "they could build no churches with towers in the public streets."⁵¹

This tolerance partially migrated to the New World along with the Dutch flag. From the beginning, officials of the Dutch West India Company realized the virtue of both a religious establishment and religious tolerance. In 1638, the Company declared that religion in New Netherland should "be taught and practiced" according to the same "[c]onfession and formularies of union" which were "publicly accepted" in Holland.⁵² This meant that the Dutch Reformed Church was the established church of the colony. However, the Dutch West India Company leaders also declared that this directive should be implemented "without . . . it being inferred from this that any person shall hereby in any wise be constrained or aggrieved in his conscience."⁵³ This call for toleration was promulgated by West India Company officials in Amsterdam. But, with a few exceptions, the leadership on the scene in New Amsterdam resisted and ignored their superiors in Amsterdam. The history of religion in New Netherland is one of constant conflict between the tolerance of the Heeren XIX,⁵⁴ who made up the governing body of the West India Company in Amsterdam, and the intolerance of the local leadership in New Amsterdam, especially under the administration of Peter Stuyvesant.

The Dutch religious and secular leaders in America believed

⁴⁷ The toleration was, in part, a reaction to years of Spanish rule over the Netherlands, which ended in 1581.

⁴⁸ GEORGE L. SMITH, *RELIGION AND TRADE IN NEW NETHERLAND: DUTCH ORIGINS AND AMERICAN DEVELOPMENT* 98 (1973).

⁴⁹ *Id.*

⁵⁰ *Id.* at 103 (quoting R.B. EVENHUIS, *OOK DAT WAS AMSTERDAM* 2 (1967)).

⁵¹ *Id.* (quoting EVENHUIS, *supra* note 50, at 196).

⁵² HENRI & BARBARA VAN DER ZEE, *A SWEET AND ALIEN LAND: THE STORY OF DUTCH NEW YORK* 281 (1977).

⁵³ *Id.* at 281-82.

⁵⁴ Literally the "Nineteen Lords Directors."

that religious toleration was dangerous to the stability of any government. These Dutch Calvinists "interpreted a harmonious state to mean one in which the magistracy and church worked together to preserve doctrinal and therefore civil unity. Conversely, they held that doctrinal diversity must necessarily lead to civil anarchy and disintegration of the state."⁵⁵

These ideas seemed particularly suited to the New Netherland colony, which was weak, underdeveloped, and precariously sandwiched between a French settlement to the north and strong English colonies to the east and south. "Because the colony was intended to be an efficient, disciplined trading center in a strange and unaccommodating wilderness, its leaders thought it essential to enforce existing social controls in a rigorous manner."⁵⁶ The rulers of New Netherland, naturally, established the Dutch Reformed Church.

Initially, the colonial officials were able to sustain religious homogeneity, but they could not maintain this goal. Refugees, especially the religiously oppressed, were more likely to move to the New World than prosperous and contented Dutch citizens. The tolerance of The Netherlands also undermined the intolerance of New Netherland. Despite persecution by the local authorities, religious dissenters moved to the colony in the 1640s and 1650s. The Heeren XIX upheld their right to remain, overruling the colony's governor on these matters. Once they were allowed to live in the colony, they quickly sought other privileges, including citizenship and the right of public religious observance. When denied the latter right, they either appealed to authorities in Holland or practiced in defiance of the law.

Religious minorities reached the colony in the 1640s, but not until the 1650s did their presence lead to political difficulties. In the 1640s, Governor-General Willem Kieft allowed various New England dissidents to settle in the colony, offering them not only religious freedom, but also "the liberty to appoint their own magistrates," subject to the approval of the Dutch leadership. Among those settling in New Netherland was the radical separatist Anne

⁵⁵ SMITH, *supra* note 48, at 64.

⁵⁶ PRATT, *supra* note 45, at 6.

Hutchinson, who moved to the colony in 1642. These refugees from New England orthodoxy tended to live by themselves in small villages and communities. They did not threaten Dutch hegemony or Dutch Reformed orthodoxy, and simultaneously added to the development of the colony.⁵⁷ Thus, as early as 1640, officials in New Netherland accepted a small number of dissenters to help populate the large and mostly empty colony. The fact that these New Englanders were also Calvinists no doubt made the Dutch more tolerant of their presence. While not members of the Dutch Reformed Church, these English settlers were theologically similar and at the same time posed no threat to the colony's established orthodoxy.

Colonial officials did not extend a similar welcome to other non-conformists who sought refuge in New Netherland. In 1653, Peter Stuyvesant, the colony's governor, declared he "would rather relinquish his office than grant permission" to a group of Lutherans who wished to import their own minister from Holland and form their own church.⁵⁸

When a handful of Portuguese Jews—refugees from the Portuguese Inquisition—arrived a year later, Dominie Johannes Megapolensis, the clerical leader of the Dutch Reformed Church in the colony, sided with Stuyvesant in an attempt to expel them. Megapolensis clearly disliked Jews, who, he believed, had "no other God than the unrighteous Mammon, and no other aim than to get possession of christian property."⁵⁹ He thought Jews were "godless rascals"⁶⁰ and hoped authorities in Holland would order their expulsion. Significantly, he did not make his case solely on culturally or religiously based anti-semitism. Rather, he defended his position by arguing that if the Jews settled in the community it would be one more step on the road to ethnic and religious chaos. He noted:

⁵⁷ H. & B. VAN DER ZEE, *supra* note 52, at 91-92.

⁵⁸ Letter from Revs. Johannes Megapolensis and Samuel Drisius to the Classis of Amsterdam (Oct. 6, 1653) (quoting Peter Stuyvesant), in 1 ECCLESIASTICAL RECORDS OF THE STATE OF NEW YORK 317-18 (Edward T. Corwin ed., 1901) [hereinafter ECCLESIASTICAL RECORDS].

⁵⁹ Letter from Rev. Johannes Megapolensis to the Classis of Amsterdam (Oct. 6, 1653), in 1 ECCLESIASTICAL RECORDS, *supra* note 58, at 334-36.

⁶⁰ *Id.*

[W]e have here Papists, Mennonites and Lutherans among the Dutch; also many Puritans or Independents, and many Atheists and various other servants of Baal among the English under this government, who conceal themselves under the name of Christians; it would create a still further confusion, if the obstinate and immovable Jews came to settle here.⁶¹

In addition to religious bigotry, the Dutch leaders opposed the settlement of Jews for financial reasons. The Portuguese Jews immediately became dependent on the charity of the colonial government, the Dutch Reformed Church, and individual Dutch settlers. Reverend Megapolensis, the Dutch cleric in the colony, later reported "they have been at our charge, so that we have had to spend several hundred guilders for their support."⁶² He noted that "they came several times to my house, weeping and bemoaning their misery."⁶³

Stuyvesant and the Dutch Reformed clerics had mixed success in their attempts to control the growth of other religions. The Dutch West India Company ruled that the Jews were to be allowed "to sail to and trade in New Netherland and to live and remain there." However, neither "Lutheran pastors" nor "any other public worship" except that of the Dutch Reformed Church would be allowed in the colony.⁶⁴ Despite laws, fines, and decisions by authorities in the metropolis, religious minorities persisted in seeking the right to worship openly as they chose. The absorption of the Swedish settlement to the south and wars with native Americans made any suppression of Lutherans unrealistic and impolitic. Ultimately, even the Reformed clergy discovered that "it was not feasible to eliminate the Lutherans because there were

⁶¹ *Id.*; see H. & B. VAN DER ZEE, *supra* note 52, at 290-91. Although unhappy with their presence in his domain, Megapolensis gave some charity to the Jews, who arrived destitute. *Id.*

⁶² Letter from Rev. Johannes Megapolensis to the Classis of Amsterdam (Mar. 18, 1655), in 1 *ECCLESIASTICAL RECORDS*, *supra* note 58, at 335-36.

⁶³ *Id.*

⁶⁴ Letter from Directors of West India Company to Peter Stuyvesant (Apr. 26, 1655), in 1 *Ecclesiastical Records*, *supra* note 58, at 338; see FREDERICK J. ZWIERLEIN, *RELIGION IN NEW NETHERLAND: A HISTORY OF THE DEVELOPMENT OF THE RELIGIOUS CONDITIONS IN THE PROVINCE OF NEW NETHERLAND* 190 (1910).

too many of them.”⁶⁵ Meanwhile, Stuyvesant was once more reprimanded for his behavior toward Jews. Authorities in Amsterdam countermanded his refusal to allow them to purchase land and instead instructed the governor that the Jews should be allowed to buy land in a section of the city of “their own choice” so they might “exercise in all quietness their religion within their houses.”⁶⁶ Jews were furthermore allowed to “quietly and peacefully carry on their business.”⁶⁷ In the same letter Stuyvesant was admonished to treat the Lutherans “quietly and leniently” and to “let them have free religious exercises in their homes.”⁶⁸

In 1657, Stuyvesant refused to allow a boatload of Quakers to land in New Amsterdam. This was the beginning of the longest and most brutal religious suppression in the colony’s history. Over the next six years, officials jailed, expelled, fined, placed at hard labor, and tortured numerous Quakers for preaching in the colony. Non-Quakers were also jailed and fined for aiding or harboring Quakers.⁶⁹

In the seventeenth century, Quakers were notorious for their opposition to most forms of political authority. With little exaggeration, one historian has argued, “[a]s Bolsheviks were feared after the Russian Revolution of the twentieth century, so the very thought of Quakers frightened people in the seventeenth.”⁷⁰

The Society of Friends was founded by George Fox in 1652. The religion grew out of Puritanism and is an extreme example of “the relentless movement of the Puritan-Reformed impulse away

⁶⁵ SMITH, *supra* note 48, at 213; see ZWIERLEIN, *supra* note 64, at 187-212 (discussing persecution of Lutherans).

⁶⁶ Letter from Directors of West India Company to Peter Stuyvesant (June 14, 1656), in 1 ECCLESIASTICAL RECORDS, *supra* note 58, at 352.

⁶⁷ *Id.*

⁶⁸ *Id.*: see PRATT, *supra* note 45, at 15-24 (describing growing struggle in New Netherland between church and state); ZWIERLEIN, *supra* note 64, at 247-65 (same).

⁶⁹ See SMITH, *supra* note 48, at 223. In 1657 Dutch authorities in New Netherlands tortured the Quaker Robert Hodgson in a variety of ways, including dragging him behind a horse cart, placing him in a vermin filled dungeon, severely whipping him and “chaining him to a wheelbarrow in the hot sun until he collapsed.” *Id.* He was later hung by his hands in a prison cell and “whipped until he was near death.” *Id.* After two days in solitary confinement, he was again whipped until near death. *Id.* Hodgson’s ordeal ended when Stuyvesant’s own sister convinced him to release Hodgson from prison and expel him from the colony. *Id.*: see also ZWIERLEIN, *supra* note 64, at 213-46 (discussing persecution of Quakers).

⁷⁰ PRATT, *supra* note 45, at 19.

from the hierarchical, sacramental, and objective Christianity of the Middle Ages toward various radical extremes in which intensely individualistic and spiritual motifs become predominant."⁷¹

[Quaker teachings] undermined the establishment by minimizing the liturgical and teaching function of an ordained ministry, abandoning the idea of objective sacraments, and inspiring conduct which was attributed to the promptings of an inner voice. Most ominous of all to the authorities was the phenomenal missionary zeal which flowed from the Quaker conviction of the universality of the Holy Spirit's work.⁷²

The Friends became known as the "Quakers" because of their shaking or "quaking" while praying and giving sermons.

The reaction of Dutch authorities to their arrival in New Amsterdam illustrates the overwhelming hostility they faced in the early colonies. The description by two Dutch Reformed ministers of the arrival of a shipload of Quakers in New Amsterdam illustrates the consternation they could cause to government officials. In early August 1657, a ship "having no flag" came into the harbor.⁷³ This ship "fired no salute before the fort, as is usual with ships on their arrival."⁷⁴ People in the colony "could not decide whether she was Dutch, French, or English."⁷⁵ When a government official boarded the ship, those on board "tendered him no honor or respect."⁷⁶ When the ship's master came before the governor of the colony, "he rendered him no respect, but stood still with his hat firm on his head, as if a goat."⁷⁷ The ship was allowed to remain in the harbor for only one night. The Dutch ministers believed the ship then went to Rhode Island "for that is the receptacle of all sorts of riff-raff people, and is nothing else than the

⁷¹ AHLSTROM, *supra* note 15, at 177.

⁷² *Id.* at 178.

⁷³ Letter from Revs. Johannes Megapolensis and Samuel Drisius to the Classis of Amsterdam (Aug. 14, 1657), in 1 ECCLESIASTICAL RECORDS, *supra* note 58, at 399-400.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

sewer, of New England.”⁷⁸ Since “all the cranks of New England” had moved to Rhode Island, the Dutch assumed that these Quakers would do the same. The ministers regretted that two Quaker women somehow managed to stay behind, and “as soon as the ship had fairly departed, these began to quake and go into a frenzy, and cry out loudly in the middle of the street, that men should repent, for the day of the judgment was at hand.”⁷⁹ The two women were soon jailed. Other Quakers coming to New Netherland were expelled, jailed, and tortured.⁸⁰

This persecution proved futile. Each new persecution seemed to strengthen the Quakers, especially in the English-speaking settlements on Long Island. The persecutions also stimulated some colonists to argue for religious toleration as a duty of Christian love. In the “Flushing Remonstrance” of 1658, thirty-one settlers, including the sheriff, called on Stuyvesant to rescind his orders levying heavy fines on anyone who harbored a known Quaker. The petitioners, who were mostly English, declared that “wee desire therefore in this case not to judge least wee be judged, neither to Condem, least wee bee Condemed, but rather let every man stand and fall on his own.”⁸¹ They felt bound by God’s law “to doe good unto all men,” and thus, by Stuyvesant’s decree, they were trapped between the law of God and that of man. Rather than persecute the Quakers, they would allow them freedom on the theory that “if God justify who can Condem, and if God Condem there is none can justifie.”⁸² Stuyvesant not only rejected the petition, but also arrested the leading petitioners for sedition.

Ultimately, officials in Holland ended the persecutions. The directors of the Dutch West India Company told Stuyvesant that they, too, wished no Quakers had moved into the colony. But once in the colony, the directors asserted “we doubt very much, whether we can proceed against them rigorously without diminishing the population and stopping immigration, which must be

⁷⁸ Letter from Revs. Johannes Megapolensis and Samuel Drisius to the Classis of Amsterdam (Aug. 14, 1657), in 1 ECCLESIASTICAL RECORDS, *supra* note 58, at 399-400.

⁷⁹ *Id.*

⁸⁰ *Id.*: see ZWIERLEIN, *supra* note 64, at 213-46 (discussing persecution of Quakers).

⁸¹ Remonstrance of the Inhabitants of Flushing, Long Island, Against the Law Against Quakers (Jan. 1, 1658), in 1 ECCLESIASTICAL RECORDS, *supra* note 58, at 412-13.

⁸² *Id.*

avored at a so tender stage of the country's existence."⁸³ In other words, the colony could not grow and prosper, and the investors with it, without tolerance. The directors told the governor to "shut your eyes" to the Quakers, and "not force people's consciences, but allow every one to have his own belief, as long as he behaves quietly and legally, gives no offence to his neighbors, and does not oppose the government." The directors pointed out that this had been the practice in old Amsterdam "and consequently" the city had "often had a considerable influx of people." New Amsterdam too "would be benefitted by" this practice.⁸⁴ As early as the 1650s, then, the officials of the Dutch West India Company understood the economic value of open immigration and cultural diversity.

By the end of the Dutch era, persons of almost any religious faith were able to live in the colony. Catholics, Jews, and Lutherans, among others, were allowed to hold their "superstitious" religious services—as the Dutch authorities called them—in private homes. The Dutch, unlike Roger Williams of Rhode Island, did not allow religious diversity in order to protect their religion from an intrusive government.⁸⁵ This toleration was not a function of Christian charity, love, nor fear of God, although some in the colony thought it should be. Nor was toleration the result of any enlightened philosophy.

Toleration in New Netherland had almost no theory nor philosophy behind it except the need to populate a frontier and encourage trade and commerce. Put simply, the Dutch West India Company placed worldly success above theology. For Peter Stuyvesant, "religion was an important instrument of social control," and the failure to exercise such control was "an invitation to an anarchy of contesting beliefs."⁸⁶ However, his superiors in Amsterdam understood that too much control of religion might lead to tyranny, which would certainly discourage settlement.

⁸³ Letter from Directors of West India Company to Peter Stuyvesant (Apr. 16, 1663), in 1 ECCLESIASTICAL RECORDS, *supra* note 58, at 530.

⁸⁴ *Id.*

⁸⁵ The conservative Calvinists who headed the Dutch Reformed Church were, in fact, comfortable with a close relationship to the state. In this sense, they resembled their theological cousins, the Puritans, in the Massachusetts Bay colony and in Connecticut.

⁸⁶ PRATT, *supra* note 45, at 24.

Religious Liberty

Catholics, Jews, Quakers, and others were allowed to settle and trade in the colony because they could make the colony grow and prosper. This was the message the Dutch officials conveyed to Stuyvesant whenever he wanted to suppress religious minorities. Stuyvesant and other colonial officials were simply told to “shut your eyes” to persons of other religions, and let everyone in the colony go about their business. Indeed, business, not religion, was the purpose of the colony. Religious toleration stimulated growth and trade. That was reason enough to allow persons of any faith to discreetly practice their religion and openly ply their trades.⁸⁷

B. English Rule and the Continuation of Tolerance

In 1664, an English fleet seized New Amsterdam and, with it, the entire Dutch empire on the mainland of North America. New Netherland was renamed New York, after the colony’s new proprietor, James, Duke of York. The English of the 1660s differed little from the rest of Europe in their support for the old concept of *cuius regio, eius religio*—“whose the region, his the religion.” Nevertheless, the very fact that England had taken over a Dutch colony meant that a certain amount of religious toleration was necessary because the overwhelming majority of the residents of the colony were not members of the Church of England.

Indeed, the colony that James claimed was the most polyglot in the New World. It included members of the Dutch Reformed Church; Lutherans from Holland, Germany, and Sweden; French Calvinists; Presbyterians from the British Isles; Puritans, Separatists, Baptists and Quakers from England, Germany and elsewhere; a variety of other Protestant sects; and a small number of Jews and Catholics. Absent was anyone who claimed membership in the Church of England.

Most of the residents of this new English colony were Dutch Reformed. No official in the “Duke’s Colony” ever contemplated expelling them or forcing them to accept the Church of England.

⁸⁷ See *id.* at 25. Pratt argues that the failure to resolve the tension and contradiction between Stuyvesant and the West India Company officials undermined the Dutch colony. This may be true, although it seems unlikely that a consistent policy of either tolerance or repression would have prevented English seizure of the colony.

This would have been impossible and impractical. Instead, the Duke and his deputies adopted an unusually tolerant policy on religious matters. The Articles of Capitulation, which the Dutch were compelled to sign, provided that the "Dutch here shall enjoy the liberty of their consciences in Divine Worship and church discipline."⁸⁸ What religious toleration the Duke granted to the Dutch, he also had to give to the Protestant dissenters living on Long Island.

Initially, all towns in the colony were allowed to establish whatever church they wished. Minority faiths were granted the right to conduct meetings openly. In 1666, Lutherans gained the right, long denied under the Dutch, to build their own churches. In 1674, the Duke of York ordered Governor Edmund Andros to "permitt all persons of what Religion soever, quietly to inhabitt wthin ye precincts of yor jurisdiccon, wthout giveing ym any disturbance or disquiet whatsoever, for or by reason of their differing opinions in matter of Religion."⁸⁹ In 1683, the New York Assembly partially codified this tolerance in the colony's Charter of Liberties and Privileges, which declared:

Noe person or persons which professe ffaith in God by Jesus Christ Shall at any time be any wayes molested punished disquieted or called in Question for any Difference in opinion or Matter of Religious Concernment . . . But that all and Every such person or persons may . . . at all times freely have and fully enjoy his or their Judgments or Consciencyes in matters of Religion throughout all the province.⁹⁰

This charter did not separate church and state, but explicitly provided for government support for all Christian churches. In his study of religion in New York, historian John W. Pratt concluded that the Charter of Liberties "amounted to a full grant of religious freedom to Christians."⁹¹ Yet, even this understates the

⁸⁸ 2 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 251 (F.B. O'Callaghan & B. Fernow eds., Albany 1853) [hereinafter NEW YORK COLONIAL DOCUMENTS].

⁸⁹ PRATT, *supra* note 45, at 33 (citing 3 NEW YORK COLONIAL DOCUMENTS, *supra* note 88, at 218).

⁹⁰ 1 COLONIAL LAWS OF NEW YORK 115 (Albany, James B. Lyon 1894).

⁹¹ PRATT, *supra* note 45, at 34-35.

reality in New York, because in 1682 the colony's Jews were allowed to have their own house of worship. While not given access to tax monies to support their teachers and clergymen, the Jews nevertheless had complete freedom of public worship—something which had been denied by the Dutch.⁹²

Even without statutes and explicit protections of religion, no one seems to have been turned away from the colony for his or her religious beliefs. New York was already a commercial entrepot and something of a melting pot. In 1678, Governor Andros reported to his superiors in London that, "[t]here are Religions of all sorts, one Church of England, severall Presbiterians and Independents, Quakers and Anabaptists, of severall sects, some Jews"⁹³ A decade later Andros's successor, Governor Thomas Dongan, reported: "Here bee not many of the Church of England; [a] few Roman Catholicks; abundance of Quakers preachers men and women especially; Singing Quakers, Ranting Quakers; Sabbatarians; Antisabbatarians; Some Anabaptists; some Independents; some Jews; in short of all opinions there are some, and the most part none at all."⁹⁴

In the 1690s, New York altered its virtually unparalleled toleration in four important ways. In the wake of the Glorious Revolution, which overthrew crypto-Catholic King James II in England and forced Governor Andros to leave the colonies, the New York Assembly adopted a new declaration of the "Rights and Privileges of their Majesties Subjects inhabiting within their Province of New York."⁹⁵ The provision on religion declared that all persons could "freely meet" and "worshipp according to their respective perswasions without being hindered or molested." This appeared

⁹² JACOB RADER MARCUS, *THE COLONIAL AMERICAN JEW, 1492-1776*, at 93-94 (1970).

⁹³ Answer of Governor to Enquiries About New York (Apr. 16, 1678), in 1 *ECCLESIASTICAL RECORDS*, *supra* note 58, at 709.

⁹⁴ Governor Dongan's Report on the State of the Province (1684), in 2 *ECCLESIASTICAL RECORDS*, *supra* note 58, at 879-80; see EDWIN SCOTT GAUSTAD, *HISTORICAL ATLAS OF RELIGION IN AMERICA* 2 (1962) (in New York, in 1686, "all sorts" of religions existed (quoting English governor, Edmund Andros)); DOUGLAS GREENBERG, *CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK 1691-1776*, at 26 (1978) (noting Dongan's acknowledgment of New York's "extraordinary heterogeneity").

⁹⁵ 1 *COLONIAL LAWS OF NEW YORK*, *supra* note 90, at 248. This was followed in 1700 by "An Act against Jesuits and Popish Priests" providing a "perpetual imprisonment" or "death" for such persons found in the colony. *Id.* at 302.

to effectively afford full toleration to everyone in the colony. However, this clause was immediately modified by a proviso, declaring that it did not apply to "any persons of the Romish Religion."⁹⁶ In another change from the early Charter of Liberties, the 1691 document did not provide for the support of ministers of all Christian faiths, "suggesting that the support arrangements in the Duke's Laws and other similar acts were no longer to be recognized."⁹⁷ This set the stage for the final change in New York law, an act to establish the Church of England as the colony's official church.

In 1693, the colonial assembly established the Church of England in New York (Manhattan), Westchester, Richmond, and Queens counties. At the time, the entire colony had only one Anglican clergyman—the chaplain at the fort in New York City. New York was an Anglican colony, but the overwhelming majority of the people were not of that religion. Indeed, even though New York was an English colony, the majority of the population was not of English descent.

Over the next eighty years, royal officials tried, with varying degrees of effort and success, to expand the power and influence of the Church of England. In the 1690s, Governor Benjamin Fletcher began the process of establishing the Church of England. In addition to securing the 1693 law establishing the Church of England as the colony's official religion, by his own patent he created Trinity Church, making it the established church for New York City. From 1702 until 1708, Edward Hyde, Lord Cornbury, vigilantly strove to make the Church of England the colony's established church in fact as well as in law. Cornbury's tenure as governor was marked by constant tension over his ruthless and impolitic attempts to impose the Church of England on a non-Anglican population. He attempted to appoint an Anglican clergyman to a vacant Dutch Reformed pulpit in Ulster County. He ordered the arrest of Presbyterian clergymen in New York City and imposed Anglican clergymen on dissenting churches in Queens. "In seven short years this one man had managed to stir up great

⁹⁶ *Id.* at 248.

⁹⁷ PRATT, *supra* note 45, at 39.

Religious Liberty

religious controversy in New York, to fortify dissenting opposition to the Anglican establishment, and to strengthen colonists' attachment to their freedom of conscience and of worship."⁹⁸

Cornbury's departure in 1708 temporarily ended most church-state conflicts in the colony. For most of the next forty years, England focused little attention on the American colonies. "Everyone supposed that the purpose of supporting colonies was to benefit the mother country in accordance with the vague precepts of mercantilist economic theory."⁹⁹ During this period, the English discovered what the leaders of the Dutch West India Company had known: that religious diversity and tolerance were more likely to lead to economic success than orthodoxy and repression. Sir Robert Walpole's motto, "let sleeping dogs be,"¹⁰⁰ apparently applied to religion in the New York colony. With the exception of outbreaks of anti-Catholic hysteria,¹⁰¹ New York continued its remarkable tolerance for religious diversity until the late 1750s.

In the 1740s and 1750s, America's first important religious revival, the Great Awakening, and the creation of King's College (later to be renamed Columbia University), revived interfaith hostilities and questions of church and state. In the 1750s, William Livingston (later the first governor of the State of New York) and others attempted to establish King's College as a nonsectarian, state-supported institution. While initially somewhat successful, they eventually lost this struggle, and the college became an Anglican institution with financial support from the colonial government. Dissenters in the colony viewed this Anglican triumph as more "evidence of a 'lust for dominion' which would ultimately lead to the suppression of all dissenting sects and a full Anglican church establishment" in New York.¹⁰²

⁹⁸ *Id.* at 58.

⁹⁹ STANLEY N. KATZ, *NEWCASTLE'S NEW YORK: ANGLO-AMERICAN POLITICS 1732-1753*, at 10 (1968).

¹⁰⁰ *Id.*

¹⁰¹ See DANIEL HORSMANDEN, *A JOURNAL OF THE PROCEEDINGS IN THE DETECTION OF THE CONSPIRACY FORMED BY SOME WHITE PEOPLE IN CONJUNCTION WITH NEGRO AND OTHER SLAVES* (New York, James Parker 1744). One example of anti-Catholic behavior was the attempt to tie the New York Slave Revolt of 1741 to a Jesuit Conspiracy. *Id.*; see also T. J. DAVIS, *A RUMOR OF REVOLT* 103-06 (1985) (specific discussion of Jesuit conspiracy).

¹⁰² Milton M. Klein, *Church, State, and Education: Testing the Issue in Colonial New York*, in *THE POLITICS OF DIVERSITY: ESSAYS IN THE HISTORY OF COLONIAL NEW YORK* 99, 99 (Milton

VI. DISESTABLISHMENT AND RELIGIOUS FREEDOM IN
REVOLUTIONARY NEW YORK

By the beginning of the Revolution, New Yorkers had a mixed heritage of religious liberty. Since the 1650s, the colony had possessed both enormous diversity and toleration. The Dutch Reformed establishment had failed to preserve theological homogeneity in the colony, and the subsequent establishment of the Church of England only intensified opinion in favor of tolerance and against orthodoxy. The struggle over King's College in the 1750s underscored the hostility to an Anglican establishment in polyglot New York. Immediately before the Revolution, fear of the imminent appointment of an Anglican bishop for the colonies helped to exacerbate tensions between the colonies and Great Britain. However, in the Provincial election of 1769, appeals to religious bigotry by the moderate Whigs backfired, and helped elect more radical Whigs to the colonial legislature.¹⁰³ Thus, well before Revolutionaries like Jefferson and Paine developed theories of religious toleration based on republican ideology, "New Yorkers had learned in the crucible of day-to-day living in a multifarious society the value of a neutral state which permitted creeds to compete for the spiritual affection of the citizenry."¹⁰⁴

Given this background, it is not surprising that New York State's first constitution guaranteed religious freedom. Indeed, the New York Constitution of 1777 is significant for its remarkable degree of religious freedom. More than any other revolutionary state constitution, New York's sought to guarantee full religious freedom. In anticipation of the federal Bill of Rights, the New York Constitution of 1777 recognized the importance of both the free exercise of religion and the separation of church and state.

The New York Constitution of 1777 did not create religious freedom with a few short clauses, as would the federal Constitu-

M. Klein ed., 1974) [hereinafter *ESSAYS*]; see PRATT, *supra* note 45, at 60-78 (describing efforts to defeat dominion of Anglican church).

¹⁰³ See generally PATRICIA U. BONOMI, *A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK* 248-67 (1971) (recounting events of 1769 election).

¹⁰⁴ Milton M. Klein, *New York in the American Colonies: A New Look*, in *ESSAYS*, *supra* note 102, at 193 (1974).

Religious Liberty

tion and Bill of Rights.¹⁰⁵ Rather, New York's constitution dealt with religion in a variety of elaborate articles. Taken together, these articles created the most tolerant constitutional order in the new nation. On the question of religious freedom, New York took the lead among the new states.¹⁰⁶

New York, reflecting its colonial past, disestablished all churches, exempted Quakers and other pacifists from test oaths and military service, and prohibited religious tests for office holding. The state also guaranteed freedom of worship, as did some other states.¹⁰⁷ New York's detailed explanation for toleration of religious observance again reflected its past. The New York Constitution of 1777 declared:

And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state, to all mankind; Provided, that the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.¹⁰⁸

From the perspective of the twentieth century, it is easy to see that the qualifications at the end of this clause were subject to abuse. One person's religious obligation could easily be seen as "licentious" by the larger community. Recent free exercise cases

¹⁰⁵ See U.S. CONST. art. II, § 1, cl. 8, art. VI, cl. 3. In addition to the First Amendment, the federal Constitution dealt with religion in two other ways. Wherever the Constitution discussed an "oath," the document allowed persons to "swear" or "affirm," thus guaranteeing that Quakers could hold office. The Constitution also provided that there would be no "religious test" for federal officeholders.

¹⁰⁶ For a discussion of religious freedom under the New York Constitution of 1777, see Finkelman, *supra* note 44, at 92-100.

¹⁰⁷ See, e.g., VA. DECLARATION OF RIGHTS of 1776, art. 16; GA. CONST. of 1777, art. LVI; PA. DECLARATION OF RIGHTS of 1777, art. II.

¹⁰⁸ N.Y. CONST. of 1777, art. XXXVIII.

involving peyote,¹⁰⁹ or pending cases involving animal sacrifice,¹¹⁰ underscore this. The persecution of the Mormons from the 1830s to the 1890s is yet another example.¹¹¹

However, from the perspective of the Revolution, this clause was remarkable for three reasons. First, it guaranteed unrestricted freedom to all religions at a time when many other states only promised such freedom to either fellow Protestants or fellow Christians. Second, this freedom was not mere toleration or the sufferance of religious minorities. It was not a gift or an indulgence from the majority to the minority. It was the result of neither *noblesse oblige* nor Christian charity. The clause did not argue for religious toleration as something good which Christians should give to others. Rather, the New York Constitution of 1777 expressed the concept of religious toleration as something central to a republican society. The clause condemned religious "bigotry" in an age when many devout persons saw nothing wrong with discrimination against their theological rivals. Finally, the clause acknowledged in frank terms the dangers of religious orthodoxy to a free society, and the past manipulation of religion for political purposes by "weak and wicked priests and princes" who "have scourged mankind."¹¹²

With two exceptions, the New York Constitution of 1777 created absolute religious freedom in the state. The first, and perhaps least important restriction was a clause which prohibited "ministers of the Gospel, or priests of any denominations whatso-

¹⁰⁹ See *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 886-89 (1990) (Free Exercise Clause found not to prohibit application of state law prohibiting ceremonial ingestion of peyote).

¹¹⁰ See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah, Fla.*, 723 F. Supp. 1467, 1488 (S.D. Fla. 1989) (42 U.S.C. § 1983 claim brought under First, Fourth and Fifth Amendments by church practicing "Santeria" [animal ritual sacrifice] failed), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992).

¹¹¹ See *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (statute prohibiting polygamy constitutional as within legislative power of Congress). For more information on the treatment of Mormons, see EDWIN BROWN FIRMAGE AND RICHARD COLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830-1900* (1988).

¹¹² The use of the term "priests" here may have been a slap at Catholicism, but it would have equally applied to the Anglican clergy, which had been a more realistic threat to the New Yorkers. Many Protestants would also have understood the term to apply to the religious leaders of ancient Israel.

ever" from holding any civilian or military office in the state.¹¹³ Five other states, Virginia, Delaware, Maryland, North Carolina, and South Carolina, had similar provisions in their constitutions. These provisions were designed to insure a separation of church and state. However misguided they might appear today, these provisions were adopted because people thought they would preserve religious liberty.¹¹⁴

Less enlightened was the last provision in the New York Constitution of 1777, concerning the naturalization of aliens. This clause required that aliens "born in parts beyond [the] sea," seeking citizenship in the state "abjure and renounce all allegiance and subjection to all and every foreign king, prince, potentate, and state, in all matters, ecclesiastical as well as civil."¹¹⁵ This oath meant that English-born Anglicans moving to New York would have to reject the authority of the King as the head of their church. During a Revolution against the King, such an oath made great sense. However, this does not appear to have been the main thrust of the provision. Rather, the key word in the provision is "potentate," which referred to the Pope. Thus, to become a citizen, a foreign-born Catholic would have had to reject allegiance to the Pope.

This oath was proposed by John Jay, who was fiercely anti-Catholic, and was designed to prevent the naturalization of European-born Catholics. Jay was not fearful that native-born Catholics would be influenced by the Pope, and he may have realized that there was no chance of disfranchising native-born Americans in any case. But, there was a fear of papal influence on Catholics from overseas, and the votes in the Convention acted on these fears. Jay and other draftsmen of the New York Constitution of 1777 also thought this oath would reduce the likelihood that "other forms of Old World reaction" would "subvert the new state."¹¹⁶

¹¹³ N.Y. CONST. of 1777, art. XXXIX.

¹¹⁴ See *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (striking down Tennessee statute prohibiting clergy from holding public office). This Supreme Court decision also invalidated similar prohibitions in other states.

¹¹⁵ N.Y. CONST. of 1777, art. XLII.

¹¹⁶ PRATT, *supra* note 45, at 95-97.

This clause was never enforced, and had no effect on Catholic immigration into New York after 1777. Nevertheless, the clause does indicate that even the most enlightened constitutional draftsmen of Revolutionary America were not capable of fully divorcing themselves from the prejudices and fears of their age.

VII. TOWARDS RELIGIOUS LIBERTY: THE CONSTITUTION AND THE BILL OF RIGHTS

When delegates from twelve of the new states met in Philadelphia in 1787, they generally ignored religion. They did so with good reason. They believed that as a government of limited powers, the new national government under the Constitution could have no power over religion. That was a local issue, to be left up to the states. As James Madison argued, the Congress could create no national religion because "[t]he government has no jurisdiction over it"¹¹⁷

The Framers also believed that the state constitutions would, in the end, be the guarantors of liberty. At the Constitutional Convention, Pennsylvania's James Wilson asserted that one purpose of the states was "to preserve the rights of individuals."¹¹⁸ Oliver Ellsworth of Connecticut explained he looked to the state governments for the preservation of his rights.¹¹⁹ Roger Sherman, also of Connecticut, argued that "the State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." He believed that the national legislature might "be safely trusted" not to interfere with the liberties of the people.¹²⁰ The Framers, however, did deal with religion in one clause. They borrowed from New York's constitution by prohibiting any religious test for public office at the national level.

During the ratification debates, many Americans opposed the Constitution because it did not protect religious liberty. Even supporters of the Constitution, like Baptist leader Reverend John Le-

¹¹⁷ Speech of James Madison (June 6, 1788), in 11 THE PAPERS OF JAMES MADISON 84 (Robert Rutland ed., 1977) [hereinafter MADISON PAPERS].

¹¹⁸ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 354 (Max Farrand ed., 1966) [hereinafter RECORDS].

¹¹⁹ *Id.* at 492.

¹²⁰ 2 RECORDS, *supra* note 118, at 588.

Religious Liberty

land, feared the Constitution because it lacked a bill of rights.¹²¹ Madison and other federalists initially argued that a bill of rights was unnecessary. Madison's arguments were, in the end, unpersuasive even to himself. After all, he ultimately, although reluctantly, introduced the Bill of Rights into Congress.¹²² Madison's arguments, however, are worth noting because in making them he outlined the essential element of religious liberty in America.

Madison argued that religious diversity in the nation was ultimately the key to religious liberty. In *The Federalist No. 10*, he noted that "[a] religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national Councils against any danger from that source."¹²³ In a later essay, Madison again asserted that the diversity of the people—not a formal bill of rights—was the key to liberty:

[T]he society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.¹²⁴

In the Virginia ratification debates, Madison advanced a similar argument. "If there were a majority of one sect, a bill of rights would be a poor protection for liberty." Freedom of religion, he argued, was secured by "that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. For where there is such a variety of sects,

¹²¹ See Lyman H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY 155, 183-196 (1952) (noting Leland's objections to Constitution).

¹²² See Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 319-20 (discussing Madison's initial opposition to and subsequent support of a bill of rights).

¹²³ THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

¹²⁴ *Id.* No. 51, at 324 (James Madison).

there cannot be a majority of any one sect to oppress and persecute the rest."¹²⁵ Reminding the Convention that he had always "warmly supported religious freedom," Madison argued that "a variety of sects," not any bill of rights, was the key to religious freedom.¹²⁶ As historian Jack Rakove has succinctly phrased it, Madison's theory rested on the notion that "[d]iversity begets jealousy, and jealousy begets security."¹²⁷

VIII. CONCLUSION

The 300 years from the age of Columbus to the age of the American Revolution marked a dramatic change in the way nations thought about religion, freedom, and diversity. By this time religious toleration had become the rule in America, and official intolerance was virtually nonexistent. Moreover, New York and other states were leading the way from tolerance to true religious liberty. Although the United States' Bill of Rights was finally ratified on December 15, 1791, the nation was not officially notified of this until 1792. Thus, by an accident of communication, true religious freedom, in the form of the First Amendment, was guaranteed in the New World nation of the United States during the Tricentenary of Columbus's voyage.

This religious freedom was, in the end, the product of the diversity of religious and ethnic groups who settled in America. Religious toleration became possible because it was necessary. No religion had a majority in the nation. The irony of the Discovery and Conquest was that the New World, at least along the eastern shore of North America, did not resemble the Old. The Spanish, French, Dutch, and English explorers and adventurers who went west sought to bring their religion with them, and convert a hemisphere to their beliefs. Ironically, the diversity of settlement and the realities of the hemisphere led to a very different result.

Despite the religious intolerance inherited from England and Europe, a remarkable degree of religious freedom quickly devel-

¹²⁵ James Madison, Address to the Virginia Ratification Convention, *reprinted in* 11 MADISON PAPERS, *supra* note 117, at 130.

¹²⁶ *Id.* at 131.

¹²⁷ Jack Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 259 (1990).

Religious Liberty

oped in the American colonies. Ironically, the issues surrounding seventeenth-century tolerance speak directly to issues on the American agenda today.

Some late-twentieth-century Americans, especially those on the right, worry about the emergence of a multi-cultural and multi-racial society. Those Americans should pay careful attention to the legacy of religious toleration that emerged from the multi-cultural society of seventeenth-century America. Indeed, the multi-culturalism of the colonies led to the very political and religious freedom that most modern conservatives cherish. It is not a great jump to suggest that America's increasing multi-culturalism in our own age will eventually lead to enhanced liberty and greater toleration. Just as the presence of dissenters, Catholics, and Jews led to toleration in the colonial period, the presence of people of non-Western faiths will lead to greater tolerance in the modern era.

Opponents of multi-culturalism also often complain about the cost of immigration. America, of course, has always been a nation of poor immigrants, who often needed public support upon their arrival. Modern xenophobes can learn from the experience of the seventeenth-century Dutch, who wished to expel the penniless Jews who arrived in 1654.

Similarly, many in America would like to see prayer returned to the public schools. What harm, they ask, can occur when the teacher leads the class in prayer? Such proponents of state support for such public displays of religion would do well to remember the teachings and ideas of Roger Williams. He opposed the use of a common book of prayer because he knew that once the state wrote the prayers, or even approved them, the very concept of prayer itself would become corrupt. The irony of this is made clear by the Supreme Court's decision in *Lynch v. Donnelly*.¹²⁸ There the Court held that the erection of a creche by city officials of Pawtucket, Rhode Island did not violate the Establishment Clause, because:

The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including

¹²⁸ 465 U.S. 668 (1984).

among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here.¹²⁹

In other words, the public display of one of the most holy symbols of Christianity is constitutional precisely because it has been corrupted by the presence of so many secular and irreligious items. Indeed, when faced with a government-erected creche standing by itself, uncorrupted by colored lights and clowns, the Court found a violation of the Establishment Clause.¹³⁰

Conversely, the politically correct left seeks to stifle ideas and viewpoints which it finds distasteful and antithetical to its system of values. While these proponents of political correctness might reject such a characterization, their ideological assertions of accepted truths and their desire to prohibit unacceptable ideas and speech sound quite like the assertions of seventeenth-century clerics—that some ideas are holy and others are blasphemous. Those people with absolute moral certainty that their ideas are correct—and thus they may silence anyone who disagrees with them—might do well to consider the dispute between John Cotton and Roger Williams over seventeenth-century theology. Williams was the first New World leader to understand the need for toleration and acceptance of nonconforming ideas. In 1635, the magistrates in Massachusetts expelled Williams for his politically incorrect ideas. Today we recognize him as the first American to understand the value of religious toleration.

Similarly, it would be hard to find anyone willing to defend those portions of the Maryland Toleration Act of 1649 which provided a death sentence for anyone who would deny the divinity of Christ, the Trinity, the "Vnity [sic] of the Godhead, or shall utter any reproachfull Speeches, words or language concerning the Holy Trinity, or any of the said three persons thereof. . . ." and provided fines and other punishment for calling anyone in the col-

¹²⁹ *Id.* at 673.

¹³⁰ *Allegheny v. ACLU*, 492 U.S. 573, 581 (1989).

Religious Liberty

ony a "heritick, Scismatick, Idolator, puritan, Independant, Prespiterian[,] popish prest, Jesuite, Jesuited papist, Lutheran, Calvenist, Anapablist, Brownist, Antinomian, Barrowist, Round-head, Sepatists, or any other name or terme in a reproachfull manner relative to matter of Religion."¹³¹ Although modern proponents of political correctness might object, this Act looks very much like the seventeenth-century version of a campus "hate speech" regulation.¹³²

Oddly enough, the Maryland Toleration Act seems to be both a seventeenth-century version of present-day political correctness *and* a seventeenth-century example of the modern conservative desire for nonpreferentialism. Many on the Supreme Court, perhaps a majority, have advocated a jurisprudence of nonpreferentialism when it comes to interpreting the Establishment Clause of the First Amendment. Such advocates would do well to review the Maryland Act, which was nonpreferential, but at the same time both an establishment and oppressive.

The Columbian Quincentenary compels us to think about issues of diversity, tolerance, and fundamental liberty. In 1992 we celebrate, not so much the maritime feats of Columbus, as the long term results of his voyages. In the area of religion those results have been liberty, based on diversity, multi-culturalism, and the understanding that suppression of ideas or beliefs (even when we "know" they are wrong) is ultimately a mistake. There is much then, that present-day Americans might learn from our early history and the struggle for religious liberty in the New World that Columbus stumbled upon five centuries ago.

¹³¹ Maryland Act Concerning Religion (1649), *reprinted in* 5 THE FOUNDERS CONSTITUTION, *supra* note 28, at 49.

¹³² For an excellent analysis of campus speech regulations, see Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933.

